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TENNESSEE COMMISSION REFUSES TO ORDER PUBLIC UTILITY TO SERVE COOPERATIVE'S CONSUMERS UPON PETITION OF THE LATTER

The petitioner filed a petition with the Tennessee Railroad and Public Utilities Commission alleging that he was being served with electricity by the Middle Tennessee Electric Membership Corporation but that he desired to be served by the Franklin Power & Light Company (a private utility) because the cost of service from the latter company would be less. The Power and Light Company answered that it was under a contract with the Tennessee Valley Authority not to serve consumers being served by the electric membership corporation. The petitioner averred that this contract was contrary to public policy. There was also filed as an exhibit a petition addressed to the Commission signed by 24 residents of the petitioner's area asking that the Commission order the power and light company to serve them because of the lower rates. The facts showed that the petitioner and the other persons requesting service from the power company had originally received service from the Tennessee Electric Power Company (a private utility) and that the facilities used to serve these people had been purchased by the Electric Membership Corporation. As to the rates, the evidence demonstrated that both the cooperative and the power company purchased their energy from TVA and resold the power at standard TVA resale rates. However, the cooperative, being organized primarily to serve rural areas, added to the TVA resale rates an amortization charge of 1¢ per kilowatt hour up to 100 kilowatt hours this, in order to pay off the indebtedness incurred in the purchasing of the distribution system used to serve these consumers. The amortization charge constituted a minimum charge of 25¢ per month or a maximum charge of $1 per month. As a result of the amortization charge levied over a period of years the members of the electric membership corporation would, in time, own their own system. Since the result of the charge was to have those who paid it acquire their own electrical system it would not apply to non-members. The petitioner and the others requesting the change of service in the instant case did not become members (electric membership corporations in Tennessee are authorized to serve non-members when such persons were already receiving service on lines acquired by a membership corporation). Consequently, pursuant to law they were charged the rates in effect at the time they received service from the electric power company. The Commission upon hearing all the evidence denied the petition. Lance v. Franklin Power & Light Co., Docket No. 2402, Tenn. R.R. & Pub. Util. Comm., Jan. 23, 1943.

The Commission first decided that pursuant to Section 30 of the Rural Electric Cooperative Act of Tennessee it had no jurisdiction over the cooperative (the Act limits jurisdiction to assessment of taxes). The Commission then went on to point out that any person served by the

cooperative that applied for membership in the cooperative would then receive service under standard TVA resale rates plus the amortization charge; and that by paying the amortization charge the members gradually acquire the system that serves them. "On the other hand," stated the Commission, "the customers of the private company have no equity in its property and therefore pay no amortization charge for debt retirement. In effect, the application of the petitioner does not represent an attempt to secure lower electricity rates but rather an unwillingness to join the cooperative and to pay their pro-rata share on a cooperative property purchase. There is here presented a case of aversion against participation in a program of rural electrification which has demonstrated its benefits throughout Tennessee and the other parts of the country." Thus, the Commission looked through the surface attempt to change the source of service and saw that it was merely an endeavor on the part of certain people to resist progress in the field of rural cooperative electrification.

The Commission then went on to point out that the public interest demanded that public services such as the service of electricity should not be subject to competitive conditions "in which the laws of the jungle alone would prevail and the public would be the ultimate sufferer." It was pointed out that electric service corporations should not be engaged in competition for consumers because if such were the case the ultimate object would be the attraction of customers rather than the public service.

In respect of federally financed distribution of electricity the Commission stated:

"Much has been said by uninformed persons about invasion of the territory of existing distribution companies by various agencies representing the Federal Government. This Commission, which has been in a position to follow closely the growth of the public power movement in Tennessee, knows that the TVA and the REA have scrupulously followed, both in letter and in spirit, a policy of refusing to enter fields of competition with private companies adequately rendering service in this State. In order to avoid direct competition these agencies have financed the purchase of existing private facilities to make possible an integrated and efficient public system. The report of the Rural Electrification Administration for the year 1939 states:

> 'Such purchases are incidental to the essential purpose of reaching unserved persons and are deemed an appropriate means to that end. In all of such instances a considerable number of farmers and other residents of rural areas would have no prospect of electric service unless such existing facilities were incorporated in the cooperative project. A collateral advantage of such purchases, although not the reason for them, is the fact that the business along such existing lines is usually attractive. Such "cream" areas, when incorporated within a new and larger rural project, can be averaged with "thin" areas which in themselves would not be self-liquidating, and which otherwise might be excluded from electric service for a long time.'

"Since this is the policy followed uniformly in this State by public distribution agencies of electricity, there is an additional obligation upon privately owned utilities and upon this Commission to impose similar restrictions against tendencies of unbridled competition."

The Commission concludes:

"The Commission is of the opinion that it would not be good public policy, nor in the public interest, for it to order a public utility under its jurisdiction to serve a customer already being served adequately by a cooperative not under its jurisdiction. Such a decision would establish a precedent which would seriously injure the program of rural electrification being carried on in the State of Tennessee and all over the United States under the Rural

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Electrification Administration. It would not be in the public interest for the Commission to interfere with this program or to handicap it in any way. If the Franklin Power and Light Company were ordered to serve petitioners, they would be able to "save" only the small sum amounting to the amortization fee charged each month by the cooperative. This would not justify the Commission in establishing a dangerous precedent which might result in unnecessary duplication of service and economic waste and which might hinder the program of rural electrification being carried on through the State."

RECENT CASES

Contracts - Meaning of the term "electrical transmission system."

Plaintiff town, by ordinance, granted to defendant's assignor the right to erect poles and wires, etc., on the streets of the town, and the exclusive privilege for the distribution of electric current in said town for 30 years. In consideration of this franchise the plaintiff reserved the right to purchase defendant's "electrical transmission system" at a fair valuation. Plaintiff brought suit for specific performance of this contract. From a decree requiring plaintiff to buy and defendant to sell defendant's entire electrical system, "including the transmission system outside the building housing the generating plant of the company and the engines and all other electrical equipment within said buildings...", both parties appealed. Held, decree reversed and cause remanded. City of West Memphis v. West Memphis Power & Water Co., 141 S.W.(2d) 527 (Ark. 1940).

After pointing out that the contract did not grant to the defendant the authority to generate electricity, but merely the right to construct an "electrical transmission system" in the streets of the town for the purpose of transmitting electricity through and over same, the court said, "We are of opinion that the words 'electrical transmission system' mean nothing more nor less than a system through which electricity may be distributed from one person or place to another person or place and does not include the manufacture or production of the electricity or power." [Ed. Note: It should be noted that the term "electrical transmission system" is used here for a limited purpose and would not generally have the narrow meaning here ascribed to it.]

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Municipal Corporations - Limitations on the authority of municipality to contract

In 1919 the defendant town passed an ordinance which was approved by a two-thirds vote of the electors. Aside from granting plaintiff power company a franchise for the construction and operation of an electric plant and water works, this ordinance provided that the defendant should rent from the plaintiff certain fire hydrants and use plaintiff's current for its street lights. It also provided that the defendant should not erect or maintain a water or an electric plant except that it purchase same from the

plaintiff; and that if at the expiration of the franchise the defendant had not purchased the property of the plaintiff, the franchise should be renewed and the defendant should continue to rent the fire hydrants and purchase electricity from the plaintiff. The term of the contract contained in the ordinance was stated to be twenty years.

In 1938, towards the twenty year period, the defendant town took steps to construct its own electric and water plant. Shortly thereafter this suit was instituted by the plaintiff to enjoin the town from constructing such a plant and to procure a declaratory judgment construing the provisions of the ordinance.

The plaintiff contended that although the contract for hydrant rentals was limited to twenty years by statute, the contract for current was not so limited; that the provisions requiring the defendant to renew plaintiff's franchise and to restrain from erecting its own plant were enforceable.

Defendant contended that the contract for current was impliedly limited to twenty years by Section 12 of Article 10 of the Missouri Constitution, that it lacked the power to restrict itself from constructing its own plant for a period of longer than twenty years, and that the franchise rights of the plaintiff terminated at the end of such period.

The decree of the chancellor favored the defendant's contentions on each point. On appeal, held, the decree of the chancellor was correct except insofar as plaintiff's franchise was terminated. Kansas City Power & Light Co. v. Town of Carrollton et al, 142 S.W.(2d) 849 (Mo. 1940).

Section 11 Article 10 of the Missouri Constitution placed a tax limit of 50 cents on each 100 dollars valuation for towns of the class into which defendant falls. Section 12 of the same article provides:

> "No * * * town * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, * * * and provided further, That any * * * town * * *incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting same * * *."

The court held that since the levy necessary to pay the rentals on the hydrants and for electric current exceeded the 50 cent limitation of Section 11, it was necessary for the town to resort to Section 12, and that under this Section the debt and the additional tax authorized was limited to a period of twenty years. Against the contention of the plaintiff that the yearly installments under the contract for the use of plaintiff's electric current were not a debt within the meaning of Section 12, the court said: "Each installment becomes a debt as it falls due and, if it exceeds the revenue provided for the year in which it falls due, there is no way in which it can be paid except by levy under Section 12." The court also was of the opinion that the proviso in

Section 12 limiting the indebtedness to twenty years applied to "any indebtedness requiring the assent of the voters" and was not confined to bonded indebtedness.

With regard to the plaintiff's contention that the defendant should be enjoined from constructing its own water and electric plant, the court expressed a willingness to accept the argument advanced by the defendant that it lacked the power to so restrain future town councils, but held that it was unnecessary to decide this point since by the terms of the ordinance the defendant did not agree to refrain from such construction during the renewal period; the term "franchise" as used comprising only an easement for the use of the streets. However, the court decided that the provision regarding the extension of the franchise was enforceable. This because the contract contained in the ordinance was separable, and because no assent of the voters was needed to grant such franchise.

RECENT LEGISLATION

In the January 1941 issue of the Law Journal, the case of State, et al v. Yuma Irr. Dist., 99 P.(2d) 704 (Ariz. 1940), was examined.

This case decided that the Arizona Legislature was without the power to exempt from taxation the property of an irrigation district. It should be noted that the effect of this case is nullified by an amendment to the Arizona Constitution which was adopted at the election held on November 5, 1940. This amendment reads as follows:

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARIZONA:

That Article XIII of the Constitution of the State of Arizona be amended by adding a section to be numbered 7 and to read as follows:

"Section 7. Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the state or of the United States; but all such districts shall be exempt from the provisions of Section 7 and 8 of Article IX of this constitution."

RECENT LEGAL MEMORANDA RECEIVED

A-427 Incorporation acts available to prospective borrowers in Alaska

A-432 Payment of bonds before maturity with the consent of bondholders

A-434 Colorado cooperative doing business in Utah

A-436 Applicability of Bulk Sales Act to sale of electric lines (Texas)

A-440 Validity of annual meeting held at a place different from one named in bylaws

A-441 Statutory requirements for filing and recording water rights in Idaho

A-443 Sale of electrical energy by cooperative to consumers in foreign state (N.C.)

A-445 Applicability of Bulk Sales Act to sale of utility property (Mo.)

A-448 Power of municipality to sell rural lines to an REA cooperative (Tenn. 49 Fayette)

section 7. [illegible] ... [illegible] ... [illegible] ...